No. 82-1938

In the Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF CALIFORNIA, ET AL., PETITIONERS

v.

STANDARD OIL COMPANY OF CALIFORNIA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), bars Sherman Act claims of retail purchasers against refiners that sold through intermediary dealers when the retail purchasers contend that the refiners agreed to raise retail prices and that no wholesale market exists.

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This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Between 1973 and 1977, petitioners—the States of California, Arizona, Oregon, Washington, and Florida—filed separate actions against respondents—16 oil companies—alleging violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2.[1] Peti-

[1] The separate actions were transferred to the Central District of California for coordinated pretrial proceedings (Pet. App. A2).

tioners contend, inter alia, that respondents conspired to fix the retail price of gasoline. Petitioners sought damages both for themselves and on behalf of their citizens as parens patriae, pursuant to 15 U.S.C. 15c (Pet. App. A2). Petitioners also sought "to represent classes of government entities and a consumer sub-class consisting of natural persons who" had purchased gasoline prior to September 30, 1976 (the date after which states were authorized to bring parens patriae actions) (*ibid.*).[2] Finally, petitioners sought to recover damages for purchases they had made from non-conspirators who allegedly were enabled to charge higher prices as a result of the price "umbrella" created by the alleged conspiracy (*id.* at A5-A6).

Following this Court's decision in *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), respondents moved to dismiss portions of the complaints. Approximately 80% of the purchases at issue in this case were made through franchised dealers (Pet. App. A3). Respondents contended that petitioners are barred by *Illinois Brick* from recovering damages for overcharges in connection with these indirect purchases (*ibid.*).[3]

Petitioners denied that *Illinois Brick* barred an action by consumers against refiners when the latter had fixed the retail price of gasoline to consumers (as opposed to the wholesale price to dealers). Petitioners also pointed out that this Court had suggested that *Illinois Brick* would not bar claims by indirect purchasers in the case of cost-plus contracts or purchases from entities "owned or controlled by the wrongdoer." Petitioners contended that both of these exceptions apply to the consumer purchases at issue

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[2] See 15 U.S.C. 15c.

[3] Direct purchases from respondents are not at issue at this stage of the pretrial proceedings.

in this case. Finally, petitioners suggested that they might be able to prove a conspiracy between respondents and their franchised dealers and that proof of such a vertical conspiracy would not be barred by *Illinois Brick* (Pet. App. C23).[4]

2. The district court granted in part and denied in part respondents' motions to dismiss. The district court held, inter alia, that *Illinois Brick* would not bar petitioners' claims to the extent they could prove that their indirect purchases were made from sellers with whom respondents had cost-plus contracts or from "entities owned or controlled by the defendants or their co-conspirators" (Pet. App. C29). The district court reviewed decisions applying the "control" exception described in *Illinois Brick* and concluded (*id.* at C19-C20):

> On the basis of these decisions, this court is able to conclude that an indirect purchaser that purchases from an entity owned or controlled by the wrongdoer may sue to recover passed-on overcharges and is excepted from the general rule of *Illinois Brick*. The question of how much control is required to meet the exception cannot be decided until a factual record is developed. The degree of ownership, profit taking, or ability to set prices will be important considerations in determining whether the intermediate seller is "controlled."

The district court also held that petitioners could not recover damages from respondents under their "umbrella" theory (*id.* at C20-C23). Finally, the district court held that petitioners would be permitted to amend their complaints to allege vertical conspiracies

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[4] However, petitioners have never amended their complaints to assert such a claim.

between respondents and their franchised dealers only if they joined the latter as defendants, so that the dealers would be bound by a judicial determination of their status as co-conspirators, thus avoiding the possibility of double recoveries against respondents (*id.* at C23-C25).

In August 1980, the district court incorporated its conclusions into a revised order consisting of five numbered paragraphs (Pet. App. C28-C30). In paragraph Second of that order, the district court defined the circumstances under which it would permit petitioners to recover damages based on their contention that respondents had set or manipulated prices at the wholesale or retail levels (*id.* at C29):

> [Petitioners] will be allowed to seek damages only as to direct purchases from the [respondents], their co-conspirators, sellers with whom [petitioner] had fixed-quantity, cost-plus contracts pre-dating the alleged violations, or entities owned or controlled by the [respondents] or their co-conspirators.

In paragraphs Third and Fourth of its order, the district court dismissed petitioners' umbrella pricing claims and granted them leave to amend their complaints to allege a retail price maintenance conspiracy on the condition that they join the retail dealers as defendants (*ibid.*).[5] On petitioners' motion, the district court certified paragraphs Third and Fourth of its order for interlocutory appeal, pursuant to 28 U.S.C. 1292(b) (Pet. App. A4). Petitioners did not ask the district court to certify paragraph Second of its order (*id.* at A4 n.1).

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[5] The remainder of the district court's order is not relevant to the issues presented in the petition for a writ of certiorari.

In September 1981, the district court denied petitioners' motion for certification of a class of retail gasoline purchasers (Pet. App. B1-B11). The court stated (*id.* at B4):

> The plaintiffs regularly have insisted that they can prove that the defendants, through horizontal conspiracy, established and controlled retail gasoline prices, that market forces thereby were superseded, and that dealer participation was insignificant. However, their explanations as to just how such control was exercised have been very general, somewhat vague, and occasionally inconsistent.

The court concluded that in view of the fact that there were thousands of retail dealers and the absence of convincing universal evidence of respondents' control over the dealers, any control or vertical agreement would have to be proved on a dealer-by-dealer basis, which would foreclose class certification under Fed. R. Civ. P. 23(b)(3). The court certified the class certification issue for interlocutory appeal under 28 U.S.C. 1292(b) (Pet. App. B11).

3. The court of appeals consolidated the two interlocutory appeals and affirmed (Pet. App. A1-A23). The court of appeals agreed with the district court that damages under petitioners' "umbrella theory" would be too remote and speculative to be recoverable, citing *Illinois Brick* (Pet. App. A5-A15). The court of appeals also agreed that Fed. R. Civ. P. 19(a)(2)(ii) would require joinder of the retail dealers as defendants if petitioners amended their complaints to allege a vertical conspiracy (Pet. App. A16-A18). Finally, the court of appeals agreed with the district court that petitioners had not tendered sufficient evidence of respondents' control over their

franchised dealers to establish that respondents could be held liable to retail purchasers as a class (*id.* at A19-A22). However, the court of appeals noted that the question of whether the control exception noted in *Illinois Brick* would apply to the facts of this case would remain open for future development (*id.* at A20-A21):

> Without giving the district court an opportunity to pass on the issue, we are unwilling at this stage of the proceedings to pronounce the precise contours of the "control" exception to *Illinois Brick* or to decide whether or not it may have application to the facts of the case. We do conclude, however, that if such an exception is applicable, the degree to which the individual retail dealers may have exercised independent pricing discretion is imporant.

The court of appeals did not address the merits of paragraph Second of the district court's August 1980 order, because that paragraph had not been certified for interlocutory appeal. Pet. App. A4 n.1.

DISCUSSION

The interlocutory decision of the court of appeals rests largely on the peculiar facts and state of the evidence in this case. The decision does not conflict with any decision of this Court or any other court of appeals. Moreover, the question raised by the petition for a writ of certiorari was not squarely addressed by the court of appeals. The court of appeals' decision may well have a significant effect on petitioners' ability to litigate a major portion of this case. However, we believe that, in its current interlocutory posture, the decision presents no clearly defined legal issue of sufficient general importance to warrant review by this Court.

The questions presented in the petition relate to the application of *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), to petitioners' claims. In *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 487-494 (1968), this Court held that a manufacturer of shoemaking machinery could not defend against a treble damages suit for overcharges on the ground that the plaintiff-purchaser, a shoe manufacturer, had passed on any excess costs of the shoemaking machinery by raising the prices of its shoes. In *Illinois Brick* the Court "decline[d] to construe § 4 [of the Clayton Act] to permit offensive use of a pass-on theory against an alleged violator that could not use the same theory as a defense in an action by direct purchasers" (431 U.S. at 735). The Court noted, inter alia, that permitting damages actions by indirect purchasers would require trial courts to apportion an overcharge among all those who may have absorbed a portion of it, thus adding "whole new dimensions of complexity to treble-damages suits and seriously undermin[ing] their effectiveness" (*id.* at 737).

Petitioners contend (Pet. 9-10) that the *Hanover Shoe/Illinois Brick* rule should not bar their claims against respondent oil companies, despite the existence of an intermediate layer of retail dealers who purchase gasoline from respondents and sell it to the consumers whom petitioners seek to represent. Petitioners note that they are alleging a conspiracy to fix the retail prices themselves, rather than a conspiracy to fix wholesale prices accompanied by a pass-through of the wholesale overcharges to consumers; in addition, petitioners point out that they allege that there is no wholesale market in which the respondents compete because of their franchise relationship with the

branded dealers. Petitioners contend that this Court never intended the *Hanover Shoe/Illinois Brick* rule to apply to the sort of market that is the subject of this case. They acknowledge (Pet. 23) that there is no conflict among the circuits on this point.

The question that petitioners present to this Court is one that was not squarely decided by the court of appeals. The district court's basic ruling on the application of *Illinois Brick* to petitioners' allegations is contained in paragraph Second of its August 1980 order. Petitioners did not seek certification of this paragraph for interlocutory appeal; rather, they requested certification only of paragraphs Third and Fourth of the 1980 order, relating to their umbrella pricing theory and vertical conspiracy allegations. The district court later applied paragraph Second of the 1980 order in its 1981 order on class certification, which was certified to the court of appeals. The court of appeals could have chosen to review paragraph Second in connection with its review of the class certification order.[6] However, it expressly declined to do so because paragraph Second itself had not been certified (Pet. App. A4 n.1).[7] This Court normally does not review questions that were not decided by the court of appeals. See *United States* v. *Mitchell*, 445

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[6] *See Amoco Transport Co.* v. *Bugsier Reederei & Bergungs, A.G.*, 659 F.2d 789, 793 n.5 (7th Cir. 1981); *Bersch* v. *Drexel Firestone, Inc.*, 519 F.2d 974, 994-995 (2d Cir.), cert. denied, 423 U.S. 1018 (1975); *Katz* v. *Carte Blanche Corp.*, 496 F.2d 747, 754 (3d Cir.) (en banc), cert. denied, 419 U.S. 885 (1974).

[7] Despite its failure to review paragraph Second, the court of appeals cited *Illinois Brick* at a number of points in its opinion and appears to have assumed its application to this case. Both petitioners and respondents take the position that the court of appeals has decided the *Illinois Brick* issue implicitly. See Pet. 7; Br. in Opp. 5 & n.3.

U.S. 535, 546 n.7 (1980); *United States* v. *Lovasco*, 431 U.S. 783, 788-789 n.7 (1977).

In addition, the question petitioners present rests on factual assumptions rejected by the courts below. Both courts concluded that petitioners had failed to present adequate support at the class certification stage for their theory that respondents uniformly were able to fix prices at the retail level.[8] Petitioners do not expressly raise that conclusion as a question for this Court's review. Thus, petitioners' questions concerning application of *Illinois Brick* to a particular factual setting are abstract in nature, at least at this stage of the proceedings.

Ultimately, petitioners may be most concerned about the rulings of the courts below that they must prove allegations about how prices were fixed on a dealer-by-dealer basis, rather than on a market-wide basis. Petitioners believe the courts below should have accepted their allegations and their presentation of evidence concerning the operation of the market for the sale of gasoline. But the courts below considered the evidence petitioners presented in support of their class certification request and concluded that it was not sufficient to support the view that the market operated uniformly and according to petitioners' theory that respondents were able to fix retail prices, as opposed to prices to dealers.

We recognize that the requirement that petitioners offer proof on a dealer-by-dealer basis increases petitioners' litigation burden considerably and could lead petitioners to terminate a major portion of litigation that has consumed very substantial amounts of

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[8] For example, the district court noted that petitioners' explanations of how respondents exercised control over retail prices "have been very general, somewhat vague, and occasionally inconsistent" (Pet. App. B4).

public resources.[9] However, we are unable to conclude that the question whether petitioners have offered sufficient support for their theory of how this particular market operates warrants this Court's attention at this time. The courts below did not rule that market-wide evidence could never be used to prove how a market operates; rather, they found that the evidence petitioners submitted at the class certification stage failed to support their allegations in the context of this particular case. No judge below disagreed with this largely fact-based conclusion. Further review at this stage might require the Court to sift through the evidence presented by both parties in connection with the motion for class certification. Petitioners have not identified a conflict among the circuits on this issue; and we are not aware that this particular question of method of proof has created such significant difficulties in the lower courts that it warrants this Court's attention.

Moreover, the extent to which the district court's ruling on the application of *Illinois Brick* will make a difference to the course of this litigation is not certain. Regardless of the application of *Illinois Brick*, petitioners will recover damages only if they can prove both the alleged conspiracy and that retail gasoline prices in fact were fixed by some means available to respondents. If petitioners fail to prove a conspiracy, their entitlement to damages will be moot. If they are able to show a conspiracy, they still must prove that respondents in fact fixed retail prices. The courts below obviously were not prepared to accept on the present record petitioners' explanations of how

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[9] The courts below appear to have foreclosed the possibility that petitioners could present additional evidence at trial that would establish on a market-wide basis that respondents controlled retail prices; rather, petitioners must present evidence on some narrower basis (presumably dealer-by-dealer).

respondents were able to fix prices at the retail level when they sold to dealers, not directly to ultimate consumers. See note 8, *supra*. However, the courts have left open the possibility that petitioners could prove that respondents owned or controlled their dealers or that they participated in a resale price maintenance agreement. If petitioners succeed in doing so, the district court might conclude that their claims for damages would not be barred by the *Illinois Brick* rule.[10] In view of these unresolved matters and the overall posture of the case, it seems appropriate for the Court to follow its usual practice of declining to review interlocutory orders. See, *e.g.*, *Brotherhood of Locomotive Firemen* v. *Bangor & A.R.R.*, 389 U.S. 327, 328 (1967). If the question petitioners present does not become moot in the course of the litigation, it will be available for review by this Court when a final judgment has been entered. See *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 257-259 (1916).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[10] It is conceivable that petitioners could obtain class certification at a later stage of the proceedings, based on development of additional evidence or theories. See Fed. R. Civ. P. 23(c)(1).

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